No. 18A_____

IN THE SUPREME COURT OF THE UNITED STATES

LABMD, INC.,

Applicant,

v.

TIVERSA, INC., a Pennsylvania Corporation,

Respondent,

M. ERIC JOHNSON, et al.,

Defendants.

Application for an Extension of Time
To File Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

APPLICATION TO THE HONORABLE
ASSOCIATE JUSTICE CLARENCE THOMAS

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PARTIES TO THE PROCEEDINGS

LabMD, Inc. ("LabMD") was the plaintiff in the United States District Court for the Northern District of Georgia and the appellant in the United States Court of Appeals for the Eleventh Circuit.

Tiversa, Inc. ("Tiversa") was a defendant in the United States District Court for the Northern District of Georgia and the appellee in the United States Court of Appeals for the Eleventh Circuit.

Trustees of Dartmouth College and M. Eric Johnson were defendants in the United States District Court for the Northern District of Georgia and were dismissed from the appeal in the United States Court of Appeals for the Eleventh Circuit.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to this Court's Rule 29.6, LabMD states that it has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

APPLICATION FOR EXTENSION OF TIME

Pursuant to this Court's Rules 13.5, 22, and 30.3, LabMD hereby requests a 60-day extension of time, to and including September 7, 2018, within which to file a petition for a writ of certiorari in this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment sought to be reviewed is the decision of the United States Court of Appeals for the Eleventh Circuit in *LabMD, Inc. v. Tiversa, Inc.*, 719 F. App'x 878

(11th Cir. 2017) (attached as Exhibit A). LabMD's Petition for En Banc Review was denied on April 10, 2018 (ruling attached as Exhibit B).

JURISDICTION

The Eleventh Circuit issued its decision on December 7, 2017. On April 10, 2018, the Eleventh Circuit denied LabMD's Petition for En Banc Review. Pursuant to this Court's Rules 13.1, 13.3, and 30.1, LabMD's petition for a writ of certiorari would be due for filing on July 9, 2018. This application is made at least 10 days before that date. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

BACKGROUND

LabMD is a small company in Atlanta, Georgia that for almost 20 years conducted diagnostic cancer testing to provide diagnoses to its physician customers. LabMD started business as Southern Diagnostics in Savannah, Georgia in 1996. It ceased laboratory operations in 2014.

Tiversa is a self-described cybersecurity company located in Pittsburgh, Pennsylvania. In 2008, Tiversa utilized proprietary technology to search for, locate and take from a computer owned by LabMD a 1,718-page document (the "1718 File") containing confidential information such as the Social Security numbers, insurance information and treatment codes of approximately 9,300 LabMD patients. In May, 2008, Tiversa's chief executive officer, Robert J. Boback, called LabMD to inform it of the 1718 File's discovery and to sell his company's "remediation" services. Boback claimed, falsely, that the 1718 File was discovered on a peer-to-peer file sharing

network and downloaded from an unknown source, the identity of which could be discovered only if LabMD hired Tiversa. After LabMD refused to buy its services, Tiversa created and used a sham corporation to report the cancer detection facility to the Federal Trade Commission along with 85 other companies whose files Tiversa supposedly found in cyberspace and who, like LabMD, refused Tiversa's services.

The sham corporation, The Privacy Institute, was created in 2009 by Eric Kline, a Pittsburgh, Pennsylvania attorney who had represented Tiversa as its outside general counsel since the company's inception in 2004. Kline formed The Privacy Institute to conceal any connection between it and Tiversa and thereafter produced to the FTC, through The Privacy Institute, LabMD's 1718 File and other records regarding the alleged data breaches by LabMD and the other 85 companies whose files Tiversa claimed it found in cyberspace.

The FTC, relying upon Tiversa's false evidence that it found the 1718 File in multiple locations in cyberspace, investigated LabMD for three and a half years. In August 2013, the FTC, continuing to rely upon Tiversa's false evidence, filed and pursued an administrative enforcement action against LabMD.

During the trial of the enforcement action, a whistleblower and former Tiversa employee testified under criminal immunity that Tiversa had taken the 1718 File directly from a LabMD computer, that Tiversa falsified its records to show that the 1718 File was found on multiple computers in cyberspace and that Tiversa's testimony regarding its claim that it found the 1718 File on computers of several

known identify thieves was false. Thereafter, the FTC withdrew all reliance upon Tiversa's false evidence.

In November, 2015, FTC Chief Administrative Law Judge Michael D. Chappell ruled in favor of LabMD due, *inter alia*, to the Commission's failure to establish that LabMD's practices caused or were likely to cause substantial injury to consumers. *In re LabMD Inc.*, 2015 FTC LEXIS 272 (F.T.C. November 13, 2015). In July, 2016, the Commission reversed its own judge and ordered LabMD to conduct a complete overhaul of its data security program. *In re LabMD, Inc.*, 2016 FTC LEXIS 128, 2016-2 Trade Cas. (CCH) P79,708 (F.T.C. July 28, 2016). LabMD thereafter petitioned the Eleventh Circuit Court of Appeals to review the Commission's decision and order. On June 6, 2018, the Eleventh Circuit ruled in favor of LabMD and against the FTC finding that the Commission's overhaul order was vague, not authorized by Congress and did not direct LabMD to cease committing an unfair act or practice within the meaning of Section 5(a) of the Federal Trade Commission Act. *LabMD, Inc. v. FTC*, No. 16-16270, 2018 U.S. App. LEXIS 15229 *32 (11th Cir. June 6, 2018).

Several years earlier, in October 2011, LabMD sued Tiversa and other parties in the Superior Court of Fulton County, Georgia, for theft of the 1718 File and violations of the Computer Fraud and Abuse Act. After that action was removed to the United States Court for the Northern District of Georgia in November 2011, Tiversa's outside general counsel, Eric Kline, arranged for one of his partners to prepare and file in the trial court below a motion to dismiss Tiversa for lack of personal jurisdiction. The motion was supported by a declaration by Boback,

Tiversa's chief executive officer, wherein he declared that "Tiversa's only solicitation of business to date in the state of Georgia consists of the one phone call and eight emails to LabMD described in the Complaint." The district court relied upon that declaration to dismiss Tiversa for lack of personal jurisdiction. *LabMD, Inc. v. Tiversa, Inc.*, No. 1:11-cv-04044-JOF, 2012 U.S. Dist. LEXIS 190853 (N.D. Ga. Aug. 15, 2012). The Eleventh Circuit affirmed the lower court, also relying upon Boback's declaration. *LabMD, Inc. v. Tiversa, Inc.*, 509 F. App'x 842 (11th Cir. 2013).

Within a few months after the deadline expired for LabMD to file a petition for certiorari regarding *LabMD, Inc. v. Tiversa, Inc.*, 509 F. App'x 842 (11th Cir. 2013), LabMD filed suit against Tiversa in federal court in Pittsburgh, Pennsylvania, Tiversa's hometown, only to be told by the United States District Court for the Western District of Pennsylvania that LabMD's claims against Tiversa were barred by statutes of limitations. The court refused to toll the time LabMD spent litigating against Tiversa in Georgia. *LabMD, Inc. v. Tiversa Holding Corp.*, Civil Action No. 2:15-cv-92, 2016 U.S. Dist. LEXIS 21250 (W.D. Pa. Feb. 22, 2016).

In January 2016, immediately after LabMD uncovered evidence that Tiversa's 2011 declaration was false, LabMD, pursuant to Rule 60(d)(3) of the Federal Rules of Civil Procedure and *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944), filed in the trial court below a motion to set aside the earlier judgment in favor of Tiversa on the ground that Tiversa had obtained the judgment by perpetrating frauds on the district court and the Eleventh Circuit. LabMD also moved for limited discovery regarding those frauds. In support of its motions, LabMD

submitted evidence that the documents produced by Kline to the FTC in 2009 proved that Tiversa had solicited business from at least five (5) other companies in Georgia. In addition, LabMD submitted newly-discovered evidence showing that Tiversa attended, presented and solicited business at a conference held in Atlanta, Georgia in March of 2010 and solicited business at the Masters Golf Tournament in August, Georgia in April of 2009.

In ruling on LabMD's motions, the district court found that "[documents Klein produced to the FTC] are evidence that Tiversa had more contacts with Georgia than it represented to this Court, (2) Mr. Kline reviewed [documents he produced to the FTC] as part of the Privacy Institute's production of documents to the FTC, and (3) Mr. Kline understood those documents to evidence Tiversa's contacts with Georgia." The district court nevertheless refused to permit LabMD any discovery regarding Kline's role in the frauds and denied LabMD's Rule 60(d)(3) motion because, the court reasoned, (1) Kline was not counsel of record in 2011 and (2) there was no evidence that Kline "actively participated" in the litigation. The Eleventh Circuit affirmed the district court's ruling.

In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944), the seminal case on setting aside judgments for fraud on the court, this Court set aside a judgment after more than one year because it found a party and its attorneys engaged in "a deliberately planned and carefully executed scheme to defraud" the patent office and the circuit court of appeals. *Id.* at 245. As a result of that fraud, the Court held it would be manifestly unconscionable to allow the judgment to stand.

Id. Here, Tiversa engaged in a deliberately planned and carefully executed scheme to defraud the FTC, the district court and the Eleventh Circuit. The holding in *Hazel-Atlas* has never been questioned and is directly on point but neither the district court nor the Eleventh Circuit applied that precedent.

Courts have the inherent power to protect against fraud. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (citing *Hazel-Atlas*). In addition, courts have the authority to set aside judgments for fraud under Fed. R. Civ. P. 60, "which authorizes discretionary judicial revision of judgments in the listed situations [under] the courts' own inherent and discretionary power...to set aside a judgment whose enforcement would work inequity." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 233-34 (1995) (citing *Hazel-Atlas*, 322 U.S. at 244).

There is no requirement in *Hazel-Atlas* or Rule 60 that an attorney implicated in his client's fraud on the court must be counsel of record or actively participate in the litigation in order for a judgment to be set aside under Fed. R. Civ. P. 60(d)(3) or *Hazel-Atlas*. Indeed, the attorney who committed fraud in *Hazel-Atlas* was an in-house lawyer who, like Kline, never entered an appearance in the lawsuit and was not a member of the bar of the court his client defrauded. The Eleventh Circuit's decision is in direct contravention of this Court's holding in *Hazel-Atlas*.

The notion that an attorney must be counsel of record or actively participate in the litigation in order to be implicated in his client's fraud on the court is not only unsupported by *Hazel-Atlas* or Fed. R. Civ. P. 60, it is also a flaccid and nonsensical requirement because *every* attorney, not just litigators, is duty bound to preserve the

integrity of the courts. *Theard v. United States*, 354 U.S. 278, 281 (1957). Indeed, disregarding the conduct of an attorney who does not "actually participate" in a lawsuit but helps his client perpetrate a fraud on the court encourages unethical non-litigating attorneys, like Kline, to allow their clients to thwart justice and succeed in deceiving the courts. Neither *Hazel-Atlas* nor any other authority permits such an outcome.

REASONS JUSTIFYING AN EXTENSION OF TIME

This case presents substantial and important questions regarding the integrity of the judicial process, the foundation of truth in our system of justice, the diminishing respect for that truth by litigants and the insidious corruption of justice that results when parties succeed in deceiving the courts and then suffer no consequence when their and their counsel's deceit is discovered and disclosed. "Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. . . . Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993).

In *LabMD, Inc. v. FTC*, 678 F. App'x 816, 819 (11th Cir. 2016), the court found:

> LabMD ceased operations in January 2014. LabMD says its business could not bear the costs imposed by the FTC investigation and litigation, so it had to close. LabMD has essentially no assets, no revenue, and does not plan to resume business in the future. It obtained counsel pro bono because it could not afford to pay a lawyer. LabMD now has no employees, and keeps only the records required by law in a secured room, on an unplugged computer that is not connected to the Internet. LabMD has less than $5,000 cash on hand, and is subject to a $1 million judgment for terminating its lease early.

LabMD has good cause for the requested extension because (1) LabMD's counsel below is a sole practitioner who has no experience in this Court; (2) LabMD has been diligently looking for additional counsel, with experience in this Court, to assist the undersigned counsel on a *pro bono* basis but has yet to locate and engage such counsel; (3) when said counsel is located and engaged, they will need additional time to become familiar with the record below, relevant legal precedents and the issues involved in this matter; and (4) LabMD does not expect to find, engage and prepare said counsel before the current deadline for filing its petition for certiorari, July 9, 2018. Thus, LabMD respectfully requests a 60-day extension of time to file its petition for certiorari so that it has additional and adequate time to locate, engage and prepare counsel with suitable experience in this Court who is willing to represent LabMD on a *pro bono* basis.

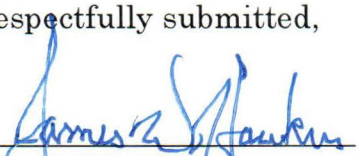
There would be no unfair prejudice if the Court were to grant LabMD's application. Moreover, there is no pressing event that would be affected by a 60-day extension of time for filing a petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, LabMD respectfully requests that this Court grant it a 60-day extension of time, to and including September 7, 2018, within which to file a petition for a writ of certiorari.

Dated: June 25, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b) of the Rules of this Court, I certify that all parties required to be served have been served. On June 25, 2018, I caused a copy of an Application for an Extension of Time To File Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on those on the attached service list.

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